UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; and GEORGE PATAKI, as Governor of the State of New York,

Plaintiffs,

v. No. 95-CV-0554 (LEK/RFT)

ONEIDA INDIAN NATION OF NEW YORK,

Defendants.

RANDOLPH F. TREECE
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending is a letter motion by Defendant Oneida Indian Nation of New York ("Nation" or "Defendant") for leave to exceed the ten deposition limit imposed by Fed. R. Civ. P. 30(a)(2)(A) and an order compelling the deposition of four high-ranking government officials pursuant to Fed. R. Civ. P. 26(b)(2), including Governor George Pataki. Plaintiffs oppose the motion. For the reasons that follow, Defendant's motion is granted in part and denied in part.

BACKGROUND

In 1993, then Governor Mario Cuomo entered into a Gaming Compact ("Compact") with the Nation pursuant to the Indian Gaming Regulatory Act ("IGRA") §§ 2701-2721. In or about January 1994, the Nation proposed the use of Instant Multi-Game system ("IMG"), an electronic video device, at its Turning Stone Casino ("Casino") and sought authorization of its use from Plaintiff State of New York ("State" or "Plaintiff") pursuant to the Compact. On November 23, 1994, the New York State Racing and Wagering Board ("Board") sent written approval adding IMG to Appendix A of the Compact. On March 10, 1995, the Nation began using IMG at the Casino. On the same day, Bradford Race, Secretary to now Governor George Pataki, sent a letter to the Nation stating that IMG was not authorized under Appendix A of the Compact.

Believing the Nation was continuing to implement IMG, Plaintiffs filed suit seeking a permanent injunction against the Nation from using IMG at the Casino. Plaintiffs contend that only the Governor and not the Board has the authority to authorize the use of IMG. Since neither then Governor Cuomo or his representative had granted such permission, IMG use was not permitted under the Compact. Plaintiffs further argue that if the Chairman of the Board had given approval for IMG use, he did not have the requisite authority from the Board Members, or alternatively, if he had the proper authority, it had not been properly exercised.

The Nation contends that the Board and its Chair had the requisite power and authority to approve IMG use and properly exercised such authority. The Nation has also asserted affirmative defenses and counter claims contending that the State failed to enter into negotiations with the Nation regarding IMG use and/or failed to negotiate in good faith as required by IGRA §§

2710(d)(4) & 2710(d)(7)(B)(iii)(II).[1] Apparently, at some stage of the dialogue between the parties, the State offered to permit IMG use at the Casino only if the Nation shared the revenues with the State. Defendant contends such revenue sharing is evidence of bad faith. The Nation further contends that, if established, this bad faith is a defense to the State's claims and would bar the injunctive relief sought.

It is this assertion by the Defendant of the State's bad faith in negotiations that is the crux of the current demand for depositions of high-ranking government officials.[2] Specifically, the Defendant seeks to depose the Governor, the Secretary of the Governor, a former Associate Governor's Counsel and an advisor to the Governor because they were the principals in the decision making process to oppose the use of IMG at the Nation's Casino, or to seek revenues from the Nation in exchange for the State's permission.

The Defendant has held eleven depositions but it claims that most of the state officials deposed testified regarding the negotiation of the Compact itself, and very little, if any, on Pataki's position to enjoin the use of these machines or to seek revenues for their use. The State opposes the motion on the ground that such depositions would exceed the limit imposed by Fed. R. Civ. P. 30(a)(2)(A). The State argues that all of the issues have been fully explored in the near dozen depositions held thus far, and it also opposes the depositions under various privileges discussed in

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[1] When read together, they permit an United States District Court jurisdiction over any cause of action initiated by an Indian Tribe arising from a State's failure to enter into negotiations with the Tribe on Gaming Compact or its conduct during negotiations was in bad faith.

[2] Both parties argue extensively the merits of the Defendant's affirmative defenses and counterclaims. Although the arguments provide valuable insight into the case, and as vocerfious as they state their positions, the viability of Defendant's affirmative defenses and counterclaims are not the issue here before this Court.

detail below.

DISCUSSION

A. Fed. R. Civ. P. 30(a)(2)(A)

Fed. R. Civ. P. 30(a)(2)(A) presumptively limits the number of depositions that each side may conduct to ten. A court may increase the number of depositions when it is consistent with the principles of Fed. R. Civ. P. 26(b)(2). See id. Rule 26(b)(2) states in pertinent part:

> The frequency or extent of [the] use of [depositions] ... shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues.

Plaintiffs contend that an extension of the ten deposition limit should not be granted because the Defendant has already obtained or had ample opportunity to obtain the information sought. The Nation, however, contends that the prior depositions involved the negotiations regarding the Compact itself and whether the November 1994 approval of IMG use was proper. The Nation further contends that additional depositions are needed to support its affirmative defenses and/or counterclaims of bad faith. Since the depositions that will be permitted are limited in number and/or scope and the Nation has demonstrated good cause for their need, leave of court to conduct additional depositions is hereby granted.

B. High-Ranking Officials

The Defendant seeks to depose Governor Pataki, Secretary Race, former Associate

Governor's Counsel Judith Hard and a special advisor to the Governor, Michael Clemente. The Defendant proffers that after eleven depositions of various state employees and officials, no one at this stage of the litigation was able to provide relevant testimony regarding the Pataki Administration's position relative to the Nation instituting IMG system at Turning Stone and its implications on the Nation's affirmative defenses and counterclaims that pertain to the State's purported failure to negotiate with the Nation in good faith. They further proffer that only these four high-ranking government officials are able to provide this needed testimony because they have direct knowledge of the formulation of the State's position. The Plaintiffs contend however that all of these employees are high-ranking officials and deserving of great legal deference in not being deposed.

It is a general proposition that high-ranking officials are not subject to deposition for justifiable reasons. Depositions of high-level governmental officials are permitted however upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his or her governmental duties. Friedlander v. City of New York, 98 CIV 1884, 2000 WL 1471566, at *2 (S.D.N.Y Sept. 2000); Marisol v. Giuliani, No. 95 CIV. 10533, 1998 WL 132810, at *2 (S.D.N.Y Mar. 1998)("Marisol I"). The essential considerations on whether a high-ranking official will be deposed are the availability of this information through alternative sources and the official having **unique personal knowledge** that cannot be obtained elsewhere or through others. Stated another way, "a party may only obtain the deposition of a high level official by showing that official has particularized first-hand knowledge that cannot be obtained from any other source." Marisol I, 1998 WL 132810, at *3.

Before the Court weighs whether one or all of these named officials will be directed to give a deposition, it is incumbent to determine who of the four officials would be deemed a high official for this purpose. Who is to be afforded protection from being deposed because of her government position? Although all of those named are important for the operation of state, not all qualify to be that high-ranking official whose time is so critical that we need "to ensure that they have the time to dedicate to the performance of their governmental functions." Id. at *3.

Without a doubt, Governor Pataki, is such a high-ranking state government official for whom the Court should not lightly impose the burden of providing a deposition. Marisol v. Guilani, No. 95 CIV. 10533, 1998 WL 158948, at *1 (S.D.N.Y. Apr. 1998) ("Marisol II"). Obviously, he is consumed daily with matters of statewide and even national relevance. The same should hold true for Bradford Race, the Secretary to the Governor. No one else is so intimately and inextricably involved with the Governor on the operation of state government and the formulation of state policy at the highest level than the Secretary. Certainly, he is one of the primary members of the Pataki cabinet. He should not be so unduly burden by a deposition if there are other alternative sources for the information. See, e.g., Universal Calvary Church v. City of New York, 96 CIV. 4606, 1999 WL 350852, at *1 (S.D.N.Y June 1999) (the plaintiff was denied depositions of the Mayor and the former and current police commissioner); Marsoil I, 1998 WL 132810, at *1 ("Common sense suggests that member of the Cabinet and the administrative head of a large executive department should not be called upon to . . . give testimony by deposition." (citation omitted)).

The same protection cannot be extended to the former Associate Governor Counsel, Judith Hard and special advisor, Michael Clemente. It is not to say that they do not provide important, maybe critical, professional services to state government and may have direct and daily contact with

the Governor or the Secretary on the vital issues of the day. But within the context of this rule, it is a matter of degree of importance that will determine who will be cloaked with this protection. Thus within this framework, an associate governor's counsel and an advisor, albeit a special one on Indian matters, were not conceived to be such a high-ranking official that would preclude a deposition of them, at least for this reason. Marisol I, 1998 WL 132810, at *1 (the former New York City Commissioner of Investigation was required to give a deposition rather than the Mayor, who was deemed to be a high-level official not to be burdened by a deposition.

The Court's next step of this review - whether the Governor and the Secretary should be compelled to give a deposition - is to determine if there are alternative sources of information and do these officials have "unique personal knowledge" of the information being sought. The Defendant has not established to the Court's satisfaction that there is no alternative source of information and that the Governor's and the Secretary's knowledge regarding the State's negotiation position is unique and personal.[3]

One alternative source of this information is Michael Clemente, the special advisor to the Governor, especially regarding Indian Tribes and Gaming matters. His knowledge would, in this Court's opinion, be similar if not greater than the Governor's on the formulation of State position on

[3] Because the Governor made public statements to the press about the State's position on the IMG and receiving revenues for their implementation and the Secretary wrote a letter to the Nation informing that IMG were not a part of the Compact's Appendix-A, the Defendant submits that these act establish their unique personal knowledge of the information and thus should be deposed. Contrary to the Defendant's argument, these public remarks, whether orally or in writing, do not establish that they are unique or that there are no alternative sources to the information it seeks. Others, in the Court's mind, can as aptly provide the facts for those stated positions just as readily as the Governor and the Secretary. Marisol I, 1998 WL 132810, at *1 ("Since Mayor Guiliani had made public comments regarding advice received from Wilson (Commissioner of Investigation), which were reported in the press, this Court ordered that Wilson's deposition could include the factual underpinnings of these publicized recommendations and conclusions." (citation omitted)).

the IMG system and the negotiations with the Defendant. Indeed, records seem to indicate that he was advising state officials almost daily on what the Nation was preparing to do to implement the IMG system and further discussing the policy and political implications.[4] The same is true for Judith Hard. The record indicates that she had been working on this issue for some time and played various roles. For example, she may have been a member of the State's negotiating team who met with representatives of the Nation when they were advised that the State was seeking revenues for use of the IMG. She was also a principal recipient of Clemente's e-mails on the topic. See Def. letter dated October 18, 1001, attach. She would then have personal knowledge relative to the state's negotiation stance, which absent privileges, would be relevant to the Defendant's affirmative defenses and counterclaim.[5]

Accordingly, Defendant's motion for leave to depose Judith Hard and Michael Clemente is granted and leave to depose Governor Pataki and Bradford Race is denied without prejudice to renew upon a greater showing of their exclusive personal knowledge.

C. Attorney-Client Privilege

Although Judith Hard, former Associate Counsel to Governor, is not shielded from giving a deposition in this matter because she is not a high-ranking official, there is another obvious legal privilege which must be considered if she is to be directed to give a deposition. It is well

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[4] Attached to the Defendant's letter dated October 18 were several e-mails sent by Mr. Clemente to various state officials including Judith Hard, which reflect his in-depth knowledge on the events concerning the Nation and IMG system.

[5] There are other witnesses who can provide the same germane testimony as the Governor and Secretary. The Plaintiff in his October 29, 2001 letter proposed in the alternative that it be permitted to designated other witnesses in lieu of the Governor, citing to such a remedy which was ordered in Marsiol II, 1998 WL 158948, at *1.

understood that disclosure of relevant information and documents is expected except where privileged. See Fed. R. Civ. P. 26(b)(2). Ms. Hard was an attorney working for the Governor during this critical period, before and during this litigation, and, although she is no longer employed as one of the Governor's counsel, her current status would not alter the attorney role with the Governor and the considerations thereof. Cf. Swidler & Berlin v. United States, 524 U.S. 399, 406 (1998) (attorney-client privilege survives client's death); see also Bulow v. Bulow, 828 F.2d 94, 100-01 (2d Cir. 1987) (attorney-client privilege "belongs solely to the client and may only be waived by him" or her). Yet it seems from the record that Ms. Hard may have been a more focal person in discussions with the Nation than just as an attorney giving advice to the Governor.

The attorney-client privilege is one of the oldest privileges recognized since common law, wherein the attorney is forbidden, with limited exceptions, to disclose any communication between the parties without the client's permission. It is therefore axiomatic that the underlying public interest principle of such a relationship is to foster candid and trusted communication without fear of disclosure and compromise and for the lawyer to provide cogent advice to her client after being fully informed. If the communication between the client and attorney is to obtain and provide legal advice, then a confidentiality privilege attaches to those conversations. Herman v. The Crescent Publ'g Group, Inc., No.00-cv-1665, 2000 WL 1371311, at *1 (S.D.N.Y Sept. 2000). This privilege is available to individuals, corporations, and government agencies alike. Id. ("Courts, commentators and government lawyers have long recognized a government attorney-client privilege . . ." (Citation omitted)).

Just because the attorney has a conversation with her client, whether deliberate or incidental, will not invoke the attorney-client privilege. Nor will the attorney's presence with her client when

other than legal advice is being sought create such a right. It is the character of the exchange that controls. If it is for the purpose of rendering and seeking legal advice then the attorney-client privilege prevails. Preferred Physicians Mut. Risk Retention Group v. Cuomo, 91 CIV. 2733, 1992 WL 235168, at *2 (S.D.N.Y Sept. 1992). Clients of in-house counsel (counsel to the Governor is in fact an in-house counsel) seek from time to time other types of advice from their attorney. It may be personal, financial or policy oriented. In this regard, that nonlegal advice is not protected, and when relevant, may be required to be disclosed. Moreover, an attorney's deposition cannot be precluded based upon this privilege if the inquiry concerns the deponent's personal direct knowledge on certain facts. Thurmond v. Compaq Computer Corp., 198 F.R.D. 475, 483 (E.D. Tex. 2000)

Here, Ms. Hard provided advice to the Governor on the Compact and communicated with other parties regarding the discussions with the Nation. These communications and any other facts she may have gleaned personally are fertile areas of inquiry.

Lastly, depositions of attorneys are generally frowned upon. The concern is that they are fraught with the peril in that there will be attempts to invade the sacrosanct protected relationship between a lawyer and her client. Yet it is not an iron clad rule that depositions of counsel cannot be held. The Court needs only to satisfy itself before compelling counsel to be deposed that no other means exist to obtain this information, the information is relevant and the information is crucial to the preparation of the case. Pereira v. United Jersey Bank, 201 B.R. 644, 678 (S.D.N.Y. 1996). This Court finds that these three elements are satisfied for this attorney to be deposed. If Ms. Hard is to be deposed, the inquiry party must be very careful not to intrude into those conversations, no matter how many, in which the communications sought and received legal advice. Her observations, nonlegal conversations, her personal statements and statement of others that she heard

on behalf of the State on this Compact matter are relevant and critical. Accordingly, unless there are other privileges precluding her testimony, Ms. Hard will be directed to provide a deposition.

D. Deliberative Executive Privilege

The Defendant is quite clear on what it seeks. The Defendant wants to review the current State's decision making process relative to the Compact. The Plaintiffs claim that the decision making process and the related information are subject to the executive privilege. They argue that without such a privilege, there will be a chilling impact on government's decision making.

The deliberative/executive privilege is a long-standing one, which protects the decision making process of an executive official, mainly to safeguard the free flow of information among key governmental officials so that government can have an unrestrained analysis to render vital decisions. Clearly the efficiency of government would be hamstrung if there was not such protection and it should not be required to testify regarding its reason for taking official action. See Hopkins v. United States of Hous. & Urban Dev., 929 F.2d 81, 83 (2d Cir. 1991); Marisol I, 1998 WL 132810, at *6. This privilege exists "when communications are both (1) predecisional and (2) deliberative." Marsiol I, 1998 WL 132810, at *6. The protected communication can be in writing, orally, advisory, recommendations, and even the mental processes of the decision makers, but does not extend to purely factual material. See Hopkins, 929 F.2d at 84; see also Marisol I, 1998 WL 132810, at *6.

But this executive privilege, as the Defendant correctly points out, must give way when the decision making process is the subject of the litigation. Marisol I, 1998 WL 132810, at *7,8. In our case, as stated previously, a critical component of the Defendant's case is whether the State is or has been negotiating with the Defendant about the IMG in good faith. Good faith can only be defined

by its motivation and intent. It is this government's intent that the Defendant claims is vital to its case and must be explored.

The executive privilege was fashioned to protect the government's deliberative process from inquiry if it is collateral to the litigation itself. However, if the party's cause of action is directed at the governments intent, as these counterclaims are, and closely tied to the underlying litigation then the privilege cannot be permitted, and must "evaporate." In Re Subpoena, 145 F.2d 1422, 1424 (D.C. Cir. 1998); McPeek v. Ashcroft, 202 F.R.D. 332, 334 (D.C.D.C 2001) ("It is certainly true that this privilege yields when the lawsuit is directed at the government's subjective motivation in taking a particular action."). Thus, the deliberative executive privilege in this matter does not bar inquiries into the Pataki Administration's intent when it opposed IMG use, but then raised the notion of receiving revenues in exchange for such use.

D. Fed. R. Evid. 408

The Plaintiffs raise another evidentiary reason why these depositions should not go forward. Both parties concurrently and consistently characterize this decision making process sought to be disclosed as negotiations. The Defendant characterizes the statements made by the State as negotiation in bad faith, while the Plaintiff's posture has been that these statements were made during the course of negotiations and therefore cannot be disclosed. Whether statements made by State officials seeking to gain revenue in order to lift its objections against the machines were made before or during litigation is of little moment. Both instances would constitute negotiations and would invariably trigger a review of the discussions consistent with Fed. R. Evid. 408. Olin v. Insurance Co. of North America, 603 F. Supp. 445, 446 (S.D.N.Y. 1985).

The statute and the cases interpreting Rule 408 are very clear that offers or acceptance of

settlement are not admissible as an **admission** to prove or disprove liability of a claim. Scott v. Goodman, 961 F. Supp. 424, 437-38 (E.D.N.Y. 1997). But the statute does not conclude there. It further reads, " . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Therefore, evidence of settlement agreements and its surrounding circumstances can fall outside this bar. Starter Corp. v. Converse, Inc., 50 U.S.P.Q.2d 1012 (2d Cir. 1999) (Rule 408 is not a bar if the offer is for "another stated purpose."); Trebor Sportswear Co. v. The Limited Stores Inc., 865 F.2d 506, 510 (2d Cir. 1989). This would also include wrongdoing within the settlement discussion, which may be disclosed. Scott v. Goodman, 961 F. Supp. at 437-38 (in settling a claim the insurance company acted in bad faith when it asked the plaintiff to waive his first amendment rights)(quoting 23 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 5314, at 282 (1980), citing Urico v. Parnell Oil Co., 708 F.2d 852 (1st Cir. 1983) (evidence not barred when offered to prove failure to mitigate damages) and Olin Corp., 603 F. Supp. at 445 (evidence of settlement negotiations not barred on claim that insurance carrier failed to settle in bad faith).

The alarm that the Plaintiff wants the Court to recognize and consider is that the Defendant is attempting to exploit an opportunity to discern its litigation strategy, and if that were true the Court would not countenance it. That is not the case however. The issue is whether the State's conduct in this negotiation was in bad faith, constituting a wrongdoing subject to disclosure. This is a proper topic for inquiry. Moreover, since the government's intent is an essential element to the Defendant's case, it too provides justification for the general proposition that Rule 408 must accede and the inquiry into all of the details surrounding the negotiation should be permitted.

WHEREFORE, it is hereby

ORDERED that the Defendant's application for leave to take more depositions in excess of the limitations imposed in Fed. R. Civ. P. 30 is **GRANTED** to the extent provided below;

ORDERED that Defendant's motion to compel the deposition of Michael Clemente is **GRANTED**;

ORDERED that Defendant's motion to compel the deposition of Judith Hard is **GRANTED** with the exception that Defendant is not to make any inquiry into attorney-client privileged communications between Judith Hard and Governor Pataki and Secretary Race;

ORDERED that Defendant's motion to compel the depositions of Governor Pataki and Secretary Bradford Race is **DENIED WITHOUT PREJUDICE** unless there is a greater showing that all alternative sources have been exhausted and that their knowledge is truly unique in this matter; and it is

ORDERED that the Uniform Pretrial Scheduling Order be amended to extend the discovery deadline to **December 6, 2001**; all other deadline remain unchanged.

Dated: November 9, 2001
Albany, New York

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UNITED STATES MAGISTRATE JUDGE